

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>CHERIE L. FERRIS</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 268,248
<b>ALL FREIGHT SYSTEMS</b>	)	
Respondent	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals the March 25, 2002 Preliminary Decision of Administrative Law Judge Robert H. Foerschler. Claimant was granted medical treatment at respondent's expense after the Administrative Law Judge found that timely notice had been given.

**ISSUES**

Respondent contends that the issue of notice was not properly decided by the Administrative Law Judge, who admitted in the order that the issue of notice "may be in doubt now," but that it was in the best interest of all parties that claimant be provided an assessment. The only issue before the Appeals Board (Board) for its consideration at this time is whether claimant provided timely notice of accident pursuant to the statute.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for the purposes of preliminary hearing, the Board finds that the order of the Administrative Law Judge should be reversed.

Claimant alleged accidental injury on April 6, 2001, while she was checking a load in the back of her semitrailer. Claimant slipped and fell, striking her hip on a pallet. While

there were no witnesses to the accident, her husband, Glenn Ferris, who team-drove with claimant for respondent, heard claimant cry out and went to check on her. Claimant's husband testified that claimant later had a large, orange-sized bruise on her hip as a result of the fall.

Claimant did not contact respondent regarding the fall, but testified that her husband telephoned respondent's dispatcher and talked to her about the fall. Claimant, however, was not a witness to that telephone conversation. Claimant's husband did testify that he contacted respondent and stated "I think I called Natalie" and told her about the fall. Respondent's customer service dispatcher, Natalie Erdman, testified that she received no call in April regarding a fall and was not aware that claimant suffered a work-related accident until approximately July 16, 2001, when she did receive a call from claimant's husband.

Claimant and her husband continued driving for respondent until approximately July 11, 2001, when they terminated their employment in order to open a bar and grill in their home town of Marysville, Kansas.

Claimant did not seek medical treatment immediately after the fall, but did contact Dorothy Brucker, a certified therapist. However, claimant stated her treatment shortly after the accident occurred as a result of a walk-in appointment with no previously scheduled appointment. Therefore, there were no medical records available to verify that appointment occurred. The only information from Ms. Brucker was dated July 23, 2001, and discussed claimant's request for therapy, but provided no time frame within which the therapy was provided.

Claimant sought no additional medical care until after the termination on July 11, 2001. Claimant acknowledges that at the time of the termination she made no mention to any of respondent's representatives about the accident.

Claimant's husband, Glenn, testified that upon returning to Kansas City immediately after the fall, he talked to both Natalie and to Missy, a.k.a. Cheryl K. Yoakum, about the accident. Natalie Erdman testified and denied any conversation with claimant until July 16, 2001. Missy did not testify, but her affidavit was attached to the preliminary hearing. In the affidavit dated July 19, 2001, Missy denied receiving a phone call prior to July 16, 2001, from claimant or claimant's husband regarding an accident.

Claimant filed a statement with respondent on July 17, 2001. In that statement, claimant discussed the fall in the trailer, which according to the statement, occurred in Las Vegas, Nevada, rather than in California as she had testified. Additionally, claimant wrote

in the statement that when they returned to respondent's Kansas City location, it was claimant who spoke to Missy and Natalie, rather than her husband.

The Administrative Law Judge in the Preliminary Decision acknowledged that the issue of notice was in doubt, but went on to state that "it seems in the best interest of all parties that such an assessment be provided by the respondent, and it is so ordered."

From the language of the Preliminary Decision, the Administrative Law Judge had doubts regarding claimant's alleged notice to respondent. The Board agrees.

K.S.A. 44-520 requires notice be provided to respondent, including time, place and particulars of the accident, within 10 days of the accident. Claimant's husband testified that he contacted both Missy and Natalie within the 10-day limit. Both Natalie and Missy deny that the contact occurred. Additionally, claimant's statement of July 17, 2001, indicates that she was the one who contacted Natalie and Missy, but then, when she testified, claimant acknowledged she did not contact respondent or any respondent representative. Claimant acknowledged that she was not privy to any conversation between her husband and any respondent's representative and did not actually hear a phone call occur.

In workers' compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g). It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

In reviewing the overall evidence, the Board finds claimant's evidence of timely notice to lack credibility. The record is contradictory regarding whether claimant or her husband made the alleged contact. Respondent's representatives deny any contact occurred on or around April 6, 2001. Claimant cannot even verify that she sought any medical treatment or any physical therapy at or around the time of the accident.

The Board finds for purposes of preliminary hearing claimant has failed to prove that she provided notice of accident in a timely fashion and the Preliminary Decision of the Administrative Law Judge should be reversed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated March 25, 2002, should be, and is hereby, reversed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 2002.

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant  
John M. Graham, Jr., Attorney for Respondent  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director